SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 779

CENTRAL KENTUCKY NATURAL GAS COMPANY, APPELLANT,

v.

RAILROAD COMMISSION OF KENTUCKY, ET AL., APPELLEES.

OBJECTIONS OF APPELLANT TO THE MOTION TO DISMISS THE APPEAL—MOTION OF APPELLANT TO DISMISS SAID MOTION AND TO STRIKE THE SAME FROM THE FILES.

Before discussing the motion to dismiss the appeal the appellant states that it has no objection to the movents being permitted to file brief herein as *amici curiæ*, or to being made intervenors herein, if they so desire, with right limited to the filing of brief on the record brought here by the appellant, and further provided that the hearing and decision of this appeal shall not be delayed.

The appellants object to the motion to dismiss the appeal, and move to dismiss said motion on the following grounds:

1. The movents are neither proper or necessary parties to this apeal. The precise question was decided by this court in the case of *In re Englehard and Sons Co.*, 231 U. S. 646 wherein the court said at pages 647-651:

> The basis of petitioner's contention is that it has a common interest with the other subscribers of the Telephone Company and may therefore intervene for itself and for them. Equity Rule 38 is cited to sustain the contention. Petitioner is not seeking, however, as it says, "for itself or for any one the recovery of a specific portion of the fund". The alternative of this would seem to be the assertion of a right to intervene and become a party to all the controversies upon which the fund may depend, and this may mean either in conjunction with the city or independently of it, and, it may be, in exclusion of it. It is said that the city is acting only for the good of the public but that that is not "the criterion to determine whether the parties in interest have the representation to which they are entitled". It is further said that however earnest the city may be to obtain restitution to the subscribers of the Telephone Company, it might not appeal from an adverse ruling. Who is going to represent the subscribers, it is asked, upon the question of fees to the master and the costs, and the costs on appeal, and who raise the question of interest? This enumeration presents the purpose of the petition for intervention. In other words, the ap-

prehension is expressed and made a basis of the petition for leave to intervene, that the city, which has so far conducted the litigation—and with success—may or will relax its attention and energy to the detriment of petitioner and the other subscribers of the company. This does not present a very strong plea against the discretion the court exercised, supposing the court had discretion to grant or refuse the petition.

It is contended, however, that the court had no discretion but to grant the petition and that Equity Rule 38 was peremptory of the right of petitioner. It recognizes the principle, it is said, "that the rights of persons should not be passed upon unless such persons are before the court or are represented by some one who is interested similarly with them". And cases are cited which, it is urged, also recognize and illustrate the principle.

We have given due consideration to the cited cases and the argument of counsel, and we are of opinion that the District Court did not exceed its discretion in making the order under review. The city was the proper party to make defendant in the suit as representative of all interested, and so throughout the whole proceedings. If we may suppose in a case like the present one there can be a distinction between the public interest and private interest, the subscribers of the company being the public, the representation of both interests was adequately fulfilled. It was in consequence of the motion of the city that the telephone company agreed to keep account of charges in excess of the ordinance rates, and, if they should finally be decided to be illegal, to pay into court the excess sums for distribution among its subscribers. It was the

representative of all interests to provide for the creation of the fund; it is properly the representative of all interests to see to its proper distribution. This is a necessary deduction from the cases. It is the universal practice, sustained by authority, that the only mode of judicial relief against unreasonable rates is by suit against the governmental authority which established them or is charged with the duty of enforcing them. As was said by Mr. Justice Miller in *Chicago, Mil. and St. P. Railway Co.* v. *Minnesota*, 134 U. S. 418, 460, it was not competent for each individual having dealings with the regulated company "to raise a contest in the courts over the questions which ought to be settled in this general and conclusive way". The rule has been repeated in subsequent cases.

Indeed, what issue is involved except that of the main suit—the character of the rates—that needs the intervention of the petitioner? As to who are subscribers of the company, there can be no controversy, nor as to the amounts to be returned to them.

In *Smith* v. *Illinois Bell Telephone Co.*, 270 U. S. 587, at page 592, it is said:

Some complaint is made to the effect that the decree attempts to bind persons not parties to the suit, including the thousands of subscribers, and to prohibit appellants from enforcing in the future any legislative remedy for excessive charges, hereafter imposed, however unreasonable they may be. As to the first branch of the complaint, it is only necessary to say that the commission represents the public and especially the subscribers, and they are properly bound

by the decree. *In re Engelhard,* 231 U. S. 646, 651.

2. While the city was a proper party in the court below and on this appeal, it would not be a necessary party were it not for the impounded fund with respect to which it represents all parties in interest. In *City of New York* v. *Consolidated Gas Co.,* 253 U. S. 219, this Court said at page 220:

> The Consolidated Gas Company of New York brought suit to enjoin the enforcement of the New York eighty-cent gas law. The jurisdiction was invoked solely upon the ground that the rate was confiscatory and hence violated constitutional rights of the company. The City of New York applied for leave to intervene as a party defendant in the action. The District Judge denied the petition for intervention, stating that the Public Service Commission, the Attorney General and the District Attorney properly represented private consumers; that the City had no interest in the litigation as a consumer; was not the governmental body which had fixed the rate and was not charged with the duty of enforcing it. From the order denying the application to intervene the City of New York prosecuted an appeal to the Circuit Court of Appeals, and the latter court affirmed the order of the District Court.
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> The application was addressed to the discretion of the District Court, and the order appealed from was not of that final character which furnished the basis for appeal. *Ex parte Cutting,* 94 U. S. 14, 22; *Credits Commutation Co.* v. *United States,* 177 U. S. 311, 315; *Ex parte Leaf Tobacco Board of Trade,* 222 U. S. 578, 581.

In the case of *City of New York* v. *New York Telephone Co.*, 261 U. S. 312, it is said at page 315:

> The necessary defendant in the suit to enjoin the orders lowering rates was the Public Service Commission whose orders they were. In addition the counsel of the Commission and the Attorney General were made parties defendant under the legislation above recited. The City of New York has no control over the rates. Its only interest in them is as a subscriber, and even as such its interest in the general rates is not direct because its own rates are settled by a special contract. Under such circumstances, the City is certainly not a necessary party.
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> *In re Engelhard and Sons Co.*, 231 U. S. 646, an action had been brought against the City of Louisville to restrain the enforcement of an ordinance prescribing telephone rates. One of the subscribers filed a petition in the District Court asking to be made a party defendant. This was denied and the petitioner sought in this Court a mandamus to compel the District Judge to grant the petition. It was pressed upon the Court that petitioner had a common interest with other subscribers in the rates under discussion and that under Equity Rule No. 38 when the question is one of common or general interest and it is impracticable to bring them all before the court, one may sue or defend for all. This Court held that the City was the proper defendant in the suit as the representative of all interested. We said:
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> "It is the universal practice, sustained by authority, that the only mode of judicial relief

against unreasonable rates is by suit against the governmental authority which established them or is charged with the duty of enforcing them."

There is nothing in this case to show that the Public Commission will not fully and properly represent the subscribers resident in New York City. Indeed it was said at the bar that the City and the Public Commission and the Attorney General were cooperating in every way in the defense of the suit. It was completely within the discretion of the District Court to refuse to allow the City to become a defendant when its interests and those of its residents were fully represented under the law and protected by those who had been made defendants. There is nothing to show that the refusal complained of was an abuse of discretion. This same controversy arose in the case of the *City of New York* v. *Consolidated Gas Co.*, 253 U. S. 219, and the same conclusion was reached.

3. The movents were not parties in the court below, as shown by the certified copy of their petition to intervene and the order thereon filed herewith marked Exhibit A, and as further shown by the certificate of the Clerk filed herewith marked Exhibit B.

4. While section 37 of the franchise contract provides that any consumer or group of consumers may be made parties to any rate controversy arising thereunder, said provision is permissive only, and does not confer upon any consumer or group of consumers the right to represent or act for other consumers.

5. Section 37 is not binding upon the Commission or Court, and permission to become parties is neces-

sarily within the discretion of the Commission or Court.

6. It is not suggested in the motion that the interests of all consumers have not been ably and effectively represented and their interests fully protected by the City and its specially employed counsel, Honorable Robert H. Winn, of Mt. Sterling, Kentucky, formerly a member of the Court of Appeals of Kentucky, and by the Honorable Clinton M. Harbison, of Lexington, Ky., corporation counsel for the City of Lexington, and by the Honorable Bailey P. Wootten, of Frankfort, Ky., Attorney General for the State of Kentucky, and by the Honorable S. H. Brown, of Frankfort, Ky., Assistant Attorney General for the State of Kentucky, who also appear on the brief for the appellees.

7. It is not suggested that in the conduct of this controversy before the Commission or Court the movents or their counsel, J. A. Edge, ever introduced or offered to introduce any witness or evidence of any kind, or ever examined or cross-examined any of the witnesses introduced by either the company or the city. In fact the contrary is shown by the record brought here by the appellant, and sought to be filed here by the movents.

8. While the portions of the record before the Commission and before the Court below now sought to be filed by the movents, show that said movents or some of them did file with the Commission certain alleged pleadings, and did file with the Clerk of the Court below certain alleged pleadings, said record also shows

that no action was ever taken thereon by the Commission, and that no notice was given to or action taken thereon by said Court.

9. While the portion of the record in the lower court filed by the movents show that some of the orders were signed by the attorney for said movents and that certain letters addressed by the Court to counsel representing the actual parties were also addressed to said J. A. Edge, counsel for said movents, said participation and recognition were merely as a courtesy and not because of separate or independent right or interest of said movents.

10. While it is asserted in paragraph 2 of the motion to dismiss that the Railroad Commission refused to take jurisdiction of this rate controversy until compelled by mandamus proceedings to do so, the record brought here by the appellant and the record now sought to be filed here by the movents conclusively show that said assertion is inaccurate.

11. While movents assert in paragraph 3 of their motion that "* * * said impoundings and related proceedings were all made upon the application of these movents," the record filed here by appellant and the record now sought to be filed here by the movents show that the impoundments made while this controversy was pending before the Commission and in the court below, were the result of the express provisions contained in the franchise contract, Section 4 (E) (R. 32) and were had upon the initiative of either the appellant (R. 75) or of the City (R. 14).

12. Appellant moves the Court to strike from the files the motion to dismiss and all of the papers attached thereto and sought to be filed herein on the ground that said motion and the affidavits filed in support thereof contain impertinent and scandalous matter, particularly in paragraphs 2 and 5 of said motion, and in the affidavits of J. W. Hardy, Wm. C. Wilson, and Jos. W. Delph.

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Counsel for Appellant.

LEXINGTON, KY., May 8, 1933.